IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24/03/2003

CORAM

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

Second Appeal No. 1922 of 1991

J. Abdul Salam ... Appellant

-Vs-

1. Arulmigu Koniamman Devasthanam
by its Executive Officer
Periya Kadai Street
Coimbatore 1

2. Anaiyappa Gounder (deceased)
3. B.M. Haneefa
4. K.P. Vasu
5. P.K.K. Abdullah ... Respondents

Second Appeal under Section 100 CPC against the Decree and Judgment 11-10-1991 passed by the II Additional Subordinate Judge, Coimbatore in A.S. No. 63 of 1990 confirming the Decree and Judgment dated 19-08 -1989 made in O.S. No. 2043 of 1982 on the file of District Munsif Court, Coimbatore.

!For Appellant : Ms. M. Mahalakshmi for
Mr. M. Kandasamy

^For Respondents : Mr. R.T. Doraisamy for R1

:JUDGMENT

The second defendant in the suit is the appellant herein. The first respondent herein has filed the suit O.S. No. 2043 of 1982 against the appellant and respondents 2 to 5 herein. The trial court decreed the suit and the appeal preferred by the appellant herein was dismissed by the first appellate Court, hence the present second appeal.
2. At the time of admission, the following substantial questions of law are framed for consideration in this second appeal.

i) Whether the Courts below are right in holding that the legal heirs of the deceased second defendant in the suit are not necessary parties, while holding the second defendant as the tenant under the 1st respondent/Plaintiff.

ii) Whether the courts below erred in Law in not holding that the suit stands abated for not bringing the legal representatives of the deceased second defendant in the suit, who according to the 1st respondent/plaintiff is the tenant?

iii) Whether the courts below erred in law in not applying the doctrine of acquiescence when the appellant paid rent from 13-11-1974 and thereby holding that the appellant has become a tenant under the 1st respondent?

iv) Whether the courts below are right in giving a finding that the rent is Rs.330/- per month when the reasonable rent is only the existing rent of Rs.230/- per month?

3. The case of the Plaintiff/first respondent herein is as follows:-

The Plaintiff is the owner of the suit property and the first defendant is a lessee in respect of the suit property from 01-01-1975 for a monthly rent of Rs.210/-. On 09-04-1975, the Plaintiff and first defendant entered into a lease agreement for a monthly rent of Rs.210/-. The rent was enhanced to Rs.330/- from 01-05-1977 which was also agreed by the first defendant. Contrary to the agreement, the first defendant has sublet the premises to Defendants 2 to 5. Due to misunderstanding, the first defendant gave complaint against the defendants 2 to 5 and then only the Plaintiff came to know the sublet and they have terminated the lease agreement on 05-06-1982. According to the Plaintiff, if there is any agreement between the first defendant and defendants 2 to 5 in respect of the property it would not bind them. As on 31-08-1981 the first defendant is liable to pay a sum of Rs.7,3 70/- towards rent, hence the suit.

4. The case of the appellant is as follows:-

The appellant's father took the vacant land of the suit property on lease and constructed the shop building thereon. Plaintiff Devasthanam had taken a decision not to let out its properties to other religious persons; that the suit property was leased out in the name of the first defendant as requested by appellant's father. The letter dated 13-11-1974 of the first defendant would prove it. The defendants 3 to 5 are partners of appellant's father. The rent for the demised premises was Rs.210/- and rent was paid for the entire period without any default. The suit ought to have been dismissed by the courts below for non-joinder of legal representatives of the first defendant and other representatives of appellant's father T.S. Abdul Jabbar. After the death of appellant's father, the appellant and his brother have been carrying on the business with the knowledge of the Devasthanam.

5. Before the trial court, the Plaintiff has examined one Subramaniam as PW1 and marked Exs. A1 to A11. The 2nd Defendant/appellant herein has examined himself as DW1 and marked Exs. B1 to B63. Before the trial court, the defendants 3 to 5 were set exparte and the second defendant

alone contested the suit.

6. The learned counsel appearing for the appellant submitted that the courts below erred in shifting the burden on the appellant to prove the quantum of rent at Rs.330/- per month; that the courts below have not taken into account that PW1 is not aware of anything as such he is not competent to speak about the case. The courts below failed to consider Exs. A1 and A7, B1 and B2 in proper perspective; that the courts below have erroneously construed that the appellant was a sub-lessee; that the Courts below erred in proceeding the suit without impleading the legal representatives of the first defendant; that the courts below erred in holding that the appellant is a sub-tenant, though the rent has been paid by him all along and prayed for allowing of the second appeal.

7. The learned counsel appearing for the first respondent submitted as follows:-

The first defendant was a tenant under them for a monthly rent of Rs.330/-. He has committed wilful default in payment of rent, hence suit was filed for recovery of possession, arrears of rent and for damages. The first defendant died pending suit, except appellant herein others were set ex-parte. The first respondent has proved that the first defendant was a tenant and the other defendants were subtenants. The letter dated 13-11-1974 said to have written by the appellant is not related to the suit property. The first appellate Court while confirming the Decree and Judgment of the trial court has rightly dismissed the Interloctuary Applications for additional evidence and impleading petition and prayed for dismissal of the second appeal.

8. The Courts below held that originally Anayappa Gounder was the tenant under the plaintiff in the suit property, who is the first defendant in the suit; that the first defendant died during the pendency of the suit after filing his written statement in the suit; that the defendants 2 to 5 have admitted that they are in possession of the suit property, hence all the legal representatives of the first defendant are not necessary parties since the suit proceedings are not under Rent Control Act, but instituted for recovery of possession, arrears of rent and for damages and the plaintiff also established that they are entitled to the said reliefs; that the first defendant admitted in Ex. A1 that he entrusted the shops to T.A. Salam and T.A. Rahim due to his illness, but they committed default; that the appellant herein has sent Ex.A6 advocate notice and admitted that the tenant was first respondent, however his father was in possession of the shop. Later, defendants 3 to 5 became partners and after his father's death he and his brother were carrying on the business along with defendants 3 to 5; that the rental receipts issued by the plaintiff only in the name of first defendant and not in the name of defendants 2 to 5; that the quantum of rent mentioned in the suit notice is Rs.330/- per month and found that the plaintiff is entitled to the reliefs.

9. Under Section 100 CPC, re-appreciation of evidence in second appeal is not permissible unless the judgment under the appeal is perverse or

based upon evidence admittedly illegal or finding is without evidence or there has been wrong construction of documents. If the findings of the courts below are based on appreciation of evidence it cannot be interfered with in the second appeal.

10. Under Section 100 CPC, High Court is not empowered to interfere with the findings of facts in second appeal on the ground of its being erroneous unless there is a substantial error or defect in the procedure prescribed by Law. High Court cannot interfere with the conclusions of fact recorded by the lower appellate Court, however erroneous, but it can interfere with on the ground of existence of legal error.

11. A concurrent findings of fact is not assailable in second appeal. In this case, the concurrent findings made by the courts below are based on adequacy of evidence. The findings that the first defendant was a tenant, quantum of rent was Rs.330/- and the dismissal of interim applications for impleading and for additional evidence and the plaintiff is entitled to the relief sought for are on proper consideration of material evidence, hence no interference of this Court is warranted.

12. In the substantial question of law 1 and 2, the appellant has wrongly mentioned ' deceased second defendant' instead of deceased second respondent. Now, I proceed to consider the said two questions of law. The suit is for recovery of possession, arrears of rent and damages. Except the deceased first defendant, the other defendants found to be in possession. When the plaintiff has established that he is entitled to recover possession from the defendants 2 to 5, who are in wrongful occupation, the Court can pass a decree against the defendants 2 to 5, who are really in occupation even in the absence of the first defendant's legal representatives since they are admittedly not in occupation. The appellant has not canvassed either before me or before the courts below that by fraud or collusion between the plaintiff and first defendant's legal representatives the suit has been prosecuted or trial has been conducted. Legal representatives brought on record under Order 22 will have the same right as that of the deceased in whose place he or she come on record. Under Order 22 Rule 2 CPC where the defendants are jointly and severally liable to the plaintiff and one of them died, his legal representatives need not be brought on record. Particularly, in this case, the first defendant himself admitted in the written statement that possession of the suit property was only with the defendants 2 to 5. It is also the case of the appellant and the defendants 3 to 5 that they are in continuous possession of the suit property nevertheless the attornment of tenancy in favour of the deceased first defendant as such the Decree can be passed against the appellant and the defendants 3 to 5. Hence, I am of the view that non-impleadment of legal heirs of the deceased first defendant is not fatal to the case and I answer the first two substantial questions of law against the appellant herein.

13. The rents relating to the suit property were made by defendants 2 to 5 in the name of the deceased first defendant, hence the doctrine of Acquiescence is not applicable and 3rd substantial question of law is also answered against the appellant.

14. The 4th substantial question of law is relating to the disputed quantum of rent at Rs.330/- which is only a question of fact and the courts below have concurrently answered the said issue against the appellant herein as such the same need not be re-apprised in the second appeal.

In view of the same, the second appeal fails, liable to be dismissed and accordingly dismissed. No costs.

24-03-2003
rsh

Index : Yes
Internet : Yes
To

1. The II Additional Subordinate Judge
Sub-Court
Coimbatore

2. The District Munsif
District Munsif Court
Coimbatore

3. The Section Officer
Vernacular Records Section
High Court
Madras □ 600 104

))□